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In The
Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS, INC., *ET AL.*,

Petitioners,

v.

GROKSTER, LTD., *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* SOVEREIGN ARTISTS ON BEHALF OF ANN WILSON & NANCY WILSON (HEART); THE JUN GROUP; RAP STATION ON BEHALF OF CHUCK D.; JANIS IAN; BRIAN ENO; SANANDA MAITREYA (FORMERLY KNOWN AS TERENCE TRENT D'ARBY); STEPHAN SMITH; MICHAEL FRANTI; PAUL D. MILLER (DJ SPOOKY); JOHN PERRY BARLOW; COLIN MUTCHLER; AUSTIN WILLACY; SAMANTHA STOLLENWERCK; JOHN HOLOWACH; JOSH FIX; COLM O'RIAIN; JIM BRUNBERG; CHRISTIAN MARCELLI; VANESSA LOWE; AND MARK HAYES, JOHN MCCOURT & KENTEN HALL (IST) IN SUPPORT OF RESPONDENTS

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STATEMENTS OF INTEREST[1]

Amici curiae are professional musicians and record labels united in the belief that peer-to-peer (P2P) file-sharing technologies such as Grokster and StreamCast currently provide non-infringing uses to musicians that are not only substantial, qualitatively and quantitatively, but are also extremely beneficial. These musicians have each used peer-to-peer networks to further their careers as musicians by introducing new audiences to their music, finding collaborators, building fan bases, and providing national and international exposure that has led to radio play and career opportunities.

Amici curiae recognize that this lawsuit does not attempt to extend copyright liability to every peer-to-peer file-sharing technology. But the arguments offered to the courts below, that the technology providers are liable for copyright infringement by providing a means by which some may make infringing uses, will surely have a chilling effect on the development of file-sharing technologies and lead to a sharp decrease in the availability, if not the complete elimination, of systems for the substantial non-infringing uses.

Sovereign Artists on behalf of Ann and Nancy Wilson, the sisters who front Heart, one of the most successful rock and roll bands of all time. Songs such as "Crazy on You," "Magic Man," "Barracuda," "These Dreams" and "Alone" brought them international success and generated multi-million record sales during their

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[1] Written consent of all parties to the filing of this brief has been filed with the Clerk of Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support.

30-year career. They have recorded 18 albums, five of which have reached the top five on the Billboard Top 200 Album chart, and the latest of which, "Jupiter's Darling," reached number three on the Top Independent Record chart. They have also had more than a dozen U.S. Top 10 singles. Heart supports the use of peer-to-peer technology and believes that it is a very efficient means of distributing music. Encrypted with "Weed" technology (www.weed share.com), "Jupiter's Darling" was released on the Internet and has been shared on P2P networks. Heart's "Weed" files outsold those on Apple's iTunes during the third week of their availability on both services.

Sovereign Artists is a music label dedicated to building and sustaining careers, and connecting artists directly to their audiences. It fully supports the use of peer-to-peer networks by its artists as a way of distributing recordings.

The Jun Group made news in Spring 2004 by brokering a deal that promoted a major rock musician's music in the P2P marketplace. Jun Group estimates that 2.5 million copies of one of his classic songs were downloaded. The initial impact on the star's new album, solely attributable to peer-to-peer file-sharing, was an eight times increase in sales in some regions. The Jun Group is a leading distributor of free licensed content in the global file-sharing community. Its patent-pending process delivers high-quality music, television, film, and video games to millions of consumers around the world who share files via P2P software programs and other applications. According to Jun Group, by conservative estimates, P2P represents more than 8 million people online at any given time executing over 600 million content searches per day. In 2003, the company released five files from Kevin Martin and the Hiwatts on behalf of YooHoo Chocolate

Drink. The music was downloaded more than two million times over a four-week period and helped YooHoo achieve the largest spike in website traffic since the inception of its site.

Rap Station on behalf of Chuck D., who is one of the leading proponents of peer-to-peer file-sharing of music. Chuck D. first achieved success as the front man for the groundbreaking hip-hop group Public Enemy. Their album, "It Takes a Nation of Millions to Hold Us Back," has been hailed as revolutionizing rap music and cementing rap as an important medium political commentary in the black community. Chuck D. launched Rap Station in 1999 as a multi-format web "supersite." The site includes television and radio programming and free music downloads, among other features. In 2003, Chuck D. testified before the Senate Permanent Subcommittee on Investigations on the benefits of P2P technology.

Janis Ian has been a recording artist, songwriter and performer for over 37 years. In that time, she has released 22 albums worldwide and received nine GRAMMY® nominations and two GRAMMY® awards. Many popular artists – including Bette Midler, Cher, Joan Baez, John Mellencamp, Glen Campbell, and Etta James – have recorded her songs. Her songs have also been featured in films and on television. Ms. Ian has been significantly helped by peer-to-peer technology. Traffic to her website (www.janisian.com) has increased dramatically since the rise of P2P technology, going to approximately 60,000 unique visitors annually to five times as many. Because people have been able to discover her music on P2P networks, her compact disc sales on her website have increased

by over 250%, generating an additional $5,000 to $10,000 annually. P2P technology has allowed her to save money on marketing while expanding the reach of her music.

Brian Eno is an internationally acclaimed musician and music producer. He was a founding member of the group Roxy Music and has had a successful solo career as well.

Sananda Maitreya (formerly known as Terence Trent D'Arby) gained international fame with his 1988 songs "Wishing Well" and "Sign Your Name" from his acclaimed album, "Introducing The Hardline According to Terence Trent D'Arby." The album has sold over 12 million copies since its release. Subsequent recordings also garnered critical and commercial acclaim. Mr. Maitreya has twice been nominated for GRAMMY® Awards winning once and has performed his music internationally. After his record label declined to release his 1998 album, "Terence Trent D'Arby's Solar Return," he purchased the rights back from the label and in April 2001 released it for free on the Internet under the name "Wild Card." The free release of his music proved to be extremely successful; he has continued to release music for free over the Internet. Most recently, Mr. Maitreya made several songs from his "Angels and Vampires" project available for peer-to-peer distribution using "Weed" technology.

Stephan Smith has been hailed by the *New York Times* and *Billboard Magazine* as the Bob Dylan and Woody Guthrie of this generation. Mr. Smith believes that peer-to-peer technology is essential to democracy. By providing an alternative to traditional distribution channels, P2P networks reach audiences hungry for politically-minded, though less mainstream, music. His song "The

Bell" was released as a free MP3 on the Internet and became the most-played antiwar song on American radio in the run up to war with Iraq. Added to the playlists of over 150 stations nationwide, the song emerged from P2P networks to be printed over 200,000 times on various albums and compilations worldwide. Another song entitled "You Ain't A Cowboy" was released on P2P networks as part of a non-profit fundraiser. This event helped popularize the practice of releasing music with a political edge on the Internet for free or non-profit benefit.

Michael Franti has been making music for almost twenty years, first in the Beatnigs, then with renowned jazz guitarist Charlie Hunter in the Disposable Heroes of Hiphoprisy, and currently with his band Spearhead. He has toured and performed worldwide with everyone from U2 to Dave Matthews Band to Ziggy Marley. His music has been praised by *Rolling Stone* and *Vibe* magazines. Mr. Franti is a fierce civil liberties supporter and an advocate for fair use and legal music sharing over the Internet. As such, he allows fans to archive, download and swap recordings of Spearhead's live performances.

Paul D. Miller ("DJ Spooky") is a musician, artist and writer working in New York City. Miller has recorded a large volume of music as "DJ Spooky that Subliminal Kid" and has collaborated with a wide variety of preeminent musicians and composers. He also composed the musical score for the Cannes and Sundance award-winning film "Slam." Mr. Miller supports peer-to-peer technology and the way it facilitates collaboration and inspires greater musical creativity by allowing more people to hear more types of music. He calls the current state of Internet music sharing the "archetypal underlying architecture for 21st century creativity."

John Perry Barlow wrote songs with The Grateful Dead from 1970 until 1995. He is currently writing songs with The String Cheese Incident and working with Gilberto Gil, Brazil's Minister of Culture, to get all of Brazil's music online. Mr. Barlow's essay on the future of copyright, "The Economy of Ideas," is taught in many law schools and his "Declaration of the Independence of Cyberspace" is posted on thousands of websites. He was called "One of the 25 Most Influential People in Financial Services" by *Future Banker Magazine*, "The Thomas Jefferson of Cyberspace" by Yahoo Internet Life, and a "Cyberspace Cadet" by the *Wall Street Journal*. Since 1998, Mr. Barlow has been a Berkman Fellow at Harvard Law School. He has likened the crackdown on file-sharing to the Grateful Dead's failed efforts to police fans who made bootleg recordings at concerts. Ultimately, allowing fans to make bootlegs increased interest in the Dead's concerts and recordings.[2]

Colin Mutchler has been writing and performing music since 1995. He believes that P2P technology is a great catalyst for musical collaboration. In 2003, he contributed an acoustic guitar song entitled "My Life" to the website Opsound.org licensing it with the permission to be downloaded, shared on peer-to-peer networks and reused. In just a few weeks, a young violinist from North Carolina who Mr. Mutchler had never met added to it and renamed it "My Life Changed." The most recent remix,

[2] Mr. Barlow is a founder and current Board member of the Electronic Frontier Foundation which is counsel to respondent StreamCast in this action.

which includes artists from three different continents, would never have been possible without the collaborative nature of peer-to-peer networks. The song can legally be shared through P2P networks as long as users give him and his collaborators credit. Mr. Mutchler's first commercial album is due later this year. He anticipates that his sales will be much higher because of his Internet collaborations and the exposure of his music to audiences through P2P technology.

Austin Willacy grew up in Cleveland, Ohio, listening to blues, rock and soul that later influenced his own music. After graduating from Dartmouth College with a degree in psychology, he joined the a capella group The House Jacks, who were signed to a major record label. He experienced great success with the band, touring widely for several years, including opening for acts such Ray Charles, James Brown, The Temptations, The Gap Band, LL Cool J, Run DMC, and Crosby, Stills and Nash. He is now a solo artist based in San Francisco. Although he was initially highly skeptical of peer-to-peer technology, its impact on his career has been overwhelmingly positive. He has been able to expand his fan base and reach people that he would have been unable to reach otherwise. Through a peer-to-peer network, he was discovered by a prominent Los Angeles recording studio, which awarded him 60 hours of free studio time. Overall, he believes that P2P technology has saved him time and money, has increased his fan base, and has provided him with new opportunities of which he would have otherwise been unaware.

Samantha Stollenwerck has been performing music since she was 16 years old. Along with her band, Samantha and the Ritual, she has performed throughout the

United States and played at large-scale events like the Austin City Limits Music Festival. Ms. Stollenwerck believes that peer-to-peer technology is a great and inexpensive way for lesser-known artists to broaden their fan base. People who likely would have never heard of her have bought show tickets, compact discs and T-shirts after hearing a song of hers that they downloaded from a P2P network.

John Holowach, credits peer-to-peer technology with launching his musical education and his musical career. Through early peer-to-peer technology such as Napster, he became exposed to musical genres to which he would otherwise have not had access. This exposure prompted him to buy more compact discs and seek out up-and-coming artists. He was also inspired to create music of his own. Mr. Holowach released his first album, a solo effort, for free on the Internet. One of his songs was then remixed by another musician hundreds of miles away, Andrew Vavrek, spawning a professional collaboration and the formation of their band Tryad. The band now releases all of its songs through Creative Commons licensing.

Award-winning singer/songwriter/multi-instrumentalist **Josh Fix** and his bandmates use peer-to-peer technology to do valuable pre-rehearsal and pre-show work outside of actual rehearsals. P2P technology also allows Mr. Fix to work quickly and efficiently with filmmakers across the country for whom he creates original scores by enabling near real-time collaboration and instantaneous feedback. In addition, the exposure Mr. Fix has received from P2P has been an immediate and significant boost to his career.

Colm O'Riain is a violinist and composer who has played on and produced numerous albums including, most

recently, the critically acclaimed "Bridge Across the Blue." He is a well-known fiddler on the Irish music scene in San Francisco, playing with his band Hy Brassyl. He is also the violinist for the animation orchestra The Sprocket Ensemble and a founding member of the theater group Dhaia Tribe. He has written and recorded music for various films including "Black Eyed Dog" and "Soot City." He has also written for theater and a wide array of ensembles from classical symphony orchestra to multi-ethnic instrumental groups.

Jim Brunberg, a songwriter and performer, has been playing music since he was eight years old when he first picked up his father's banjo. In 1993, he formed the band Box Set with Jeff Pehrson. Box Set has caught the attention of the Billboard and Gavin music charts, as well as music critics and major radio stations throughout the country. Box Set was named Group of the Year by the National Association of Songwriters.

Christian Marcelli is a New York musician who has toured with the band Thrust Supersonic, and has performed throughout the United States. Mr. Marcelli believes that peer-to-peer technology is indispensable for collaboration between artists and for inspiring new talent. He also believes that it is a great promotional tool for local musicians who want to expand their fan base nationally or even internationally without having to rely on the major record labels for promotion and distribution of their music.

Vanessa Lowe is an independent performing musician in the San Francisco Bay Area. She has released three albums independently and frequently performs

around the country, both solo and with her band. She sells compact discs at shows, on her own website, and through other Internet retailers. She also often makes her music available on the Internet for people to access at no charge. Ms. Lowe strongly supports peer-to-peer music sharing and believes that it serves the core artistic purpose of music – to make music as widely available as possible to the listening audience. She believes that limiting P2P technology will result in the unfair limiting of access to music.

Mark Haynes, John McCourt and Kenten Hall are the members of **ist**, an independent band based in the United Kingdom. In the four years of its existence, the band has, without the backing of a major record label, produced and released four critically acclaimed albums and played over 500 gigs in the United Kingdom. Using the Internet, primarily file-sharing, exclusively, they have cultivated the seeds of a worldwide fan base that stretches from America to Zaire. They believe that file-sharing is an essential tool for independent artists and that their careers depend on it.

As the foregoing demonstrated, amici represent a diverse group of musicians that have extensive knowledge and experience in the music industry. Many of the facts asserted in the argument of this brief are drawn from the personal knowledge of the amici.

SUMMARY OF ARGUMENT

The Ninth Circuit correctly found that defendants' peer-to-peer file-sharing technologies are capable of substantial non-infringing uses. In so doing, the court properly acknowledged the benefits that peer-to-peer technology provides to musical artists seeking to reach audiences previously accessible only through the entrenched distribution channels provided by record companies.

Many professional musicians have found peer-to-peer file sharing technology to be an important tool for distributing their music to audiences they otherwise would never reach. For musicians not signed with a major recording label, these networks provide one of the few mechanisms for cultivating a fan base outside of their local communities without having to incur the substantial expense of traveling across the country and the world for live performances. This technology allows for a musician's fans, driven only by their devotion to the art, to market a musician's work widely, a service that a less well-established musician would not otherwise be able to afford. It also allows for artists who were once, but are no longer, favored by major label promotional support to extend their careers by reaching new audiences. The technology gives hope to future copyright owners that they will not be limited to the old captive distribution channels which offered opportunities to the very few.

Amici curiae are musical artists and record labels. Some are well known. Others are not. Some earn their livelihoods with their music. Others must still work day jobs while they nurture their artistic careers. Some

have won GRAMMY® Awards and had hit records. Others are not widely known outside local communities.

Importantly, these artists, unlike the record companies who have brought this action and the amici joining the brief of National Academy of Recording Arts & Sciences et al. ("NARAS amici"), do not purport to represent all professional musicians. To the contrary, the amici joining this brief recognize that artists disagree about the net benefits of peer-to-peer technology. That musicians' individual opinions on peer-to-peer technology vary widely has been confirmed by independent research.

These artists firmly believe that the peer-to-peer technology offered by defendants Grokster and StreamCast is not only capable of substantial non-infringing uses, but that it in fact has many. Moreover, the technology has the immediate potential to develop into a significantly more prevalent alternative distribution and promotion system that would without question "stimulate artistic creativity for the general good"[3] and "promote the progress of . . . the useful arts."[4] However, a decision in this case imposing secondary copyright liability on these peer-to-peer technology providers will block that potential from ever being fully realized.

These artists do not support copyright infringement. But they do support the cultivation of alternative distribution channels for their works and the works of future musicians, even if it means sacrificing a modicum of their own copyright benefits to get there.

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[3] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431-32 (1984).

[4] U.S. Const. art 1, section 8.

For these reasons, amici respectfully urge the affirmance of the judgment below.

ARGUMENT

I. MANY MUSICIANS AND ARTISTS OF OTHER MEDIA FEEL THAT PEER-TO-PEER TECHNOLOGY IS BENEFICIAL AND DO NOT PERCEIVE SHARING OF COPYRIGHTED WORKS OVER PEER-TO-PEER NETWORKS AS A THREAT TO THEIR ARTISTIC ENDEAVORS

Contrary to the assertions of both the Petitioner record companies and the NARAS amici, musicians are not universally united in opposition to peer-to-peer file sharing. To the contrary, many musicians find peer-to-peer technology to be very beneficial in that it allows them easily to reach a worldwide online audience. And to many musicians, the benefits of this potentially worldwide exposure outweighs the risks of copyright infringement.

That professional musicians, much like the general public, are divided on these issues was confirmed by the Pew Internet & American Life Project's recent survey *Artists, Musicians and the Internet*.[5] The survey found that 35% of the 2,755 musicians surveyed believed that "file-sharing services are not bad for artists because they help promote and distribute an artist's work."[6] Only 23% believed that "file-sharing services are bad for artists

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[5] Mary Madden, Artists, Musicians and the Internet, Pew Internet & American Life Project (December 5, 2004) (<www.pewinternet.org/PPF/r/142/report_display.asp>).

[6] *Id.* at p. 34.

because they allow people to copy an artist's work without permission or payment."[7] Further evidencing a lack of consensus, 35% agreed with both statements.[8]

Musicians are similarly divided over the extent to which the preponderance of free downloading of music from the Internet has helped or harmed their careers as musicians. The results were as follows:

- 37% said free downloading has not really made a difference
- 35% said it has helped
- only 5% said it has exclusively hurt.[9]

The survey yielded similar results regarding musicians' concerns about unauthorized use of their copyrighted works. When asked "whether online music file-sharing has made it harder to protect their music" from

[7] *Id.* at p. 34.

[8] *Id.* at 34. The results were similar when the sample was broken down into "Starving Musicians," those musicians spend 30 or more hours per week engaged in music-related activities but earn less 80% of their total income from music, and "success stories," who spend 30 or more hours per week engaged in music-related activities but earn more than 80% of their income from music. *Id.* at 26. The responses of the Starving Musicians resembled those of the total sample. Of the Success Stories, 35% agreed that file sharing was bad. *Id.* at 34-35.

[9] *Id.* at 35. Even among the Success Stories, only 13% believed free downloading has exclusively hurt their careers. And only 16% said it has both hurt and helped. *Id.* Of the small group of all musicians who responded that free downloading has exclusively hurt their careers, a strong majority identified themselves as primarily songwriters rather than performers. *Id.* Amicus curiae Janis Ian agrees that peer-to-peer technology does pose greater risks to songwriters. However, she believes that if necessary that problem can be addressed in a focused way through commercial models rather than a broad based extension of copyright liability to distributors of technology.

unauthorized use, only 16% said the Internet has had a big effect in allowing unauthorized use of their music, and 21% said it had a small effect. Notably, 41% said it had no effect at all.[10]

Artists working in other media reported similar results. Of the 809 self-identified "artists" surveyed, 79% said that the Internet had not made it harder to protect their work from unauthorized use.[11] Only 3% believed the Internet had a big effect on making it harder to protect their art from unauthorized use. And only 11% reported a small effect.[12] Overall, artists are divided but not deeply concerned about file-sharing. Only 14% said they are very concerned and 28% somewhat concerned about file-sharing; while 22% are not concerned at all and 31% "not too concerned."[13] The vast majority of the artists believed that file-sharing poses only a minor threat or no threat at all to creative industries like music and movies.[14] They split almost evenly on the question of whether file-sharing services were good or bad for artists.[15]

These findings should be no surprise to the National Academy of Recording Arts & Sciences. Indeed, its website devoted to music downloading, www.whatsthedownload.com, contains an "Artist Buzz" section where users can read and listen to the "straight up" opinions of various

[10] *Id.* at 35. Among Success Stories, 30% reported a big effect, 25% a small effect, and 36% no effect at all. *Id.*

[11] *Id.* at 15.

[12] *Id.* at 15.

[13] *Id.* at 21.

[14] *Id.* at 21.

[15] *Id.* at 21-22.

recording artists and industry members regarding peer-to-peer file sharing.[16] As the NARAS site, but not its amicus brief, notes, these opinions are "diverse" and "cover a wide variety of perspectives." "To some artists, file-swapping networks like Kazaa are seen as a way to build a bigger fan base and increase exposure for their music. Yet, some popular music artists may not support unlicensed Web sites like Kazaa or Morpheus at all!"[17]

II. THE SUBSTANTIAL NON-INFRINGING USES OF PEER-TO-PEER FILE-SHARING SYSTEMS ARE NOT MERELY HYPOTHETICAL; PEER-TO-PEER FILE-SHARING CURRENTLY PROVIDES SUBSTANTIAL OPPORTUNITIES TO MUSICIANS TO DISTRIBUTE THEIR WORK

Petitioners and the NARAS amici would have this Court believe that the substantial non-infringing uses of Grokster and StreamCast are merely hypothetical. But this position ignores the substantial benefit that such systems currently offer to musicians who choose to participate in

[16] http://www.whatsthedownload.com/artist_buzz/index.aspx.

[17] *Id.* (visited February 24, 2005). And some artists approve of even unauthorized file-sharing simply because they enjoy having their music heard regardless of the financial effects. *See* Artist Buzz Statement of Moby, http://www.whatsthedownload.com/artist_buzz/quotes/index.aspx#2 (visited February 24, 2005) ("Well, the whole reason I started making music is cause I love music and I'm flattered if anyone makes an effort to listen to my music whether they buy a CD, whether they do a legal download, whether they download something illegally, whether they listen to it at a friend's house. I just am flattered and honored when someone makes the effort to listen to my music. So, of course I support legal downloading, but, to be honest with you I'm pleased if someone downloads my music illegally. Again I feel quite flattered.").

them, and the prevalence with which they are currently employed.

Prior to the advent of Internet peer-to-peer file-sharing, musicians seeking to cultivate audiences outside of their local communities were left with few options.[18] The distribution of recordings to retailers was controlled largely by a few large national record companies.[19] Musicians not under contract with a distributor had little access to audiences to which they could not personally travel and perform their music. Young people aspiring to be musicians faced daunting odds of ever being signed by a record label. Many were inevitably discouraged from pursing their craft as a profession. Even those fortunate enough to be signed found that professional and artistic fortune were at the mercy of internal politics at their labels.[20]

Audiences too had access to only a very small percentage of the music being recorded worldwide. There was little opportunity to hear music that was not produced by local musicians or which was not being distributed nationally or internationally by a record label.

The Internet changed that. The Internet allows musicians without record-label contracts to distribute

[18] William Fisher, *Promises to Keep: Technology, Law, and The Future of Entertainment*, Stanford University Press (2004).

[19] The Recording Industry Association of America asserts that its members create, manufacture and/or distribute 90% of all "legitimate" sound recordings sold in the United States. <http://www.riaa.com/about/default.asp>.

[20] Courtney Love, "Courtney Love Does the Math," Salon.com (June 14, 2000), <http://dir.salon.com/tech/feature/2000/06/14/love/index.html?pn=1>.

their music directly to Internet users worldwide.[21] Peer-to-peer file-sharing programs allow users to share music with each other exponentially increasing the distribution potential of a single recording. They also provide a mechanism for musicians to offer free samples of their music without having to invest personally in the Internet bandwidth for their own websites or experiencing significant strain on their servers.[22] And unlike personal websites maintained by the musicians, file sharing programs allow for targeted marketing of music to audiences who have demonstrated an interest in similar music and facilitate the rapid dissemination of musical recordings to those seeking them.[23]

To those musicians who choose to participate, the peer-to-peer systems offer substantial benefits. New musicians trying to cultivate a loyal following have access to audiences far beyond their local reach. They can thus cultivate fan bases in distant locations without having to tour or break into radio playlists.[24] When they do tour they have an audience waiting for them.[25]

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[21] "Content & Control: Assessing the Impact of Policy Choices on Potential Online Business Models in the Music & Film Industries", Berkman Center for Internet & Society, Harvard Law School (January 7, 2005) at AIII-7 <http://cyber.law.harvard.edu/media/content_and_control>.

[22] "Content & Control," *supra* note 20, at AIII-3.

[23] "Content & Control," *supra* note 20, at AIII-2,7.

[24] For example, the 2001 recording "Stroke of Genie-us" by DJ Freelance Hellraiser got started as a free download and on unauthorized peer-to-peer websites but has worked its way onto radio playlists and earned a review by the music critic of the *New Yorker*. Rodney Ho, "DJs' combinations put different spins on popular songs." Atlanta Journal-Constitution (February 21, 2005) E1.

[25] The band O.A.R., for example, developed a strong following in the Midwest after fans began taping their live performances and

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Older artists whose works are no longer widely available through conventional distribution systems similarly benefit.[26] Peer-to-peer systems provide a mechanism for keeping their "out of print" recordings in circulation, and allows for continuing cultivation of new audiences.[27]

In many cases, the artists will reap financial benefits even though they have received no compensation for sharing their recordings. One who is first exposed to a musician through a peer-to-peer network may then seek out and purchase that musician's recordings, pay to attend a concert, or purchase merchandise.

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sharing the songs via peer-to-peer networks. Richard Harrington, "The DIY Attitude of O.A.R." Washington Post (December 24, 2005) T05.

[26] *See* Marjorie Heins, "The Progress of Science and the Useful Arts": Why Copyright Today Threatens Intellectual Freedom (Free Expression Policy Project: 2d ed. 2003) at 41 <http://www.fepproject.org/policyreports/copyright2dexsum.html> ("John Alderman points out that through file-sharing, 'songs and artists were rediscovered by listeners whose fond memories wouldn't support a $16 CD but who were happy to download a song for a nostalgic listen.' In this scenario, no sale is lost because none was likely in the first place. To the contrary, the triggering of fond memories might lead to a purchase that would not otherwise happen.") (quoting John Alderman, *Sonic Boom: Napster, MP3 and the New Pioneers of Music* (Cambridge, MA: Perseus, 2001), p. 108).

[27] *See* James Altucher, "Rock n' roll returns are here to stay." Financial Times (U.S.A. ed.) (February 22, 2005) ("James Brown is making more money on 'I Feel Good' than when it was a #1 hit in 1965, adjusted for inflation, despite MP3, Napster, filesharing, whatever. There's been a proliferation of outlets for music. Apple sold 4m iPods last year. That's an entire industry of people buying songs online now. The cash flows for the top-charted artists of all time are bigger than ever.").

These are not mere hypothetical situations. As the Pew Internet survey revealed, 83% of the musicians surveyed offered free samples online. Of those, substantial numbers reported benefits in the form of higher CD sales, larger concert attendance and more radio play.[28] These results were corroborated by the survey of consumers. The vast majority of those surveyed who do download music for free reported that they usually end up supporting the artist in other ways such as buying a CD or book or going to a performance.[229]

Logically then, the only category of musicians which arguably may not reap such benefits from peer-to-peer systems are those who are currently or were in the past "signed to a major-label or nationally distributed independent label," which is precisely how the NARAS amici describe themselves.[30] It is no surprise then that these musicians apparently, based on their participation as amici curiae, do not perceive the substantiality of these legal uses of peer-to-peer systems. But even musicians who are represented by a record label, unless perhaps they

[28] Madden, *supra* note 5 at iv.

[29] *Id.* at 43. Several other surveys similarly found that file-sharing had the effect of increasing CD sales. *See* Heins, *supra* at 41.

[30] NARAS brief at 3. *See also* Artist Buzz Statement of Black Eyed Peas, http://www.whatsthedownload.com/artist_buzz/quotes/index.aspx#23 (visited February 24, 2005) ("Our general thoughts are that for up-and-coming groups that don't have deals and that are trying to get exposure and publicity, it's a forum that is good for them. People that do have deals, however, and have records coming out, a lot of times don't get the record sales that they want. But it's good for people that don't have the means of distribution.").

are major stars, do not reap huge profits from their recordings, and would likely benefit as much from file-sharing as they are likely to suffer diminished income from lost sales. Musician Jason Mraz contributing his "artist buzz" to the NARAS-sponsored website www.whatsthedownload.com, estimated that half of his fan base that attends his concerts learned about him through file-sharing.[31]

The experiences of amici curiae are emblematic of the benefits available to those who choose to take advantage of the non-infringing uses of peer-to-peer systems.

Peer-to-peer file sharing has proved to be a boon to amicus curiae Janis Ian, an acclaimed singer-songwriter and two-time GRAMMY® award winner whose best-known songs were recorded in the 1970s. [JA 125-26] Since the advent of peer-to-peer systems, she has seen a dramatic increase in interest in her music as new audiences have discovered her work. [JA126] This increased interest has translated into increased CD sales. [JA 126] Peer-to-peer systems also allow her to experiment with new cost-effective methods of promotion. [JA 126-27]

Amicus curiae Stephan Smith has found peer-to-peer networks to be essential to his commercial success as a musician. Smith released his song "The Bell" as a free MP3 file on the Internet. The song emerged from peer-to-peer distribution to be added to the playlists of over 150 radio stations and be printed over 200,000 times on various albums and compilations. Even though he is now signed with a record label, he continues to use peer-to-peer

[31] http://www.whatsthedownload.com/artist_buzz/quotes/index.aspx#5) (visited February 24, 2005).

distribution to promote his music. He believes that peer-to-per networks are especially important for the distribution of his political songs which, because of their timeliness, cannot be distributed via normal commercial means.

In 2003, amicus curiae Colin Mutchler posted an acoustic guitar track entitled "My Life" on a website and authorized others to download, share and reuse it as long as proper attribution was given. The work was accessed over a peer-to-peer network by a young violinist in North Carolina who added to it and renamed it "My Life Changed." The piece has continued to evolve with the most recent remix, including contributions from artists spanning three continents. File-sharing of his song and its derivations has provided Mutchler with a built-in market for his first commercial recording which will be released later this year.

Amicus curiae Sananda Maitreya, who was known as Terence Trent D'Arby when he had several hits in the 1980s, has posted several of his recordings for free on the Internet, including an entire album the rights for which he purchased back from his record label after the label declined to release it. He found that the free distribution of his music through peer-to-peer networks helped him maintain his fan base and created a market for subsequent recordings that were sold both as CDs and as online downloads. Currently, he is using the Weed file-sharing technology,[32] a "superdistribution" service which overlays

[32] See http://www.weedshare.com. The peer-to-peer network MusicMatch offers a similar sampling system that allows users to play a song three times before being charged. Alex Veiga, "Licensed online music services see upside to limited file-sharing." Detroit News detnews.com

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onto peer-to-peer technology such as Grokster and StreamCast, to distribute three songs from his most recent recording. The technology will allow users to play a downloaded track three times for free.[33]

Amici curiae Ann and Nancy Wilson, of the acclaimed and commercially successful band Heart, are also using Weed with great success. Heart made tracks from its new album and a special version of one of its older hits available to peer-to-peer networks. As a result, the band sold more songs via peer-to-peer networks in its first few weeks than it did through Apple's iTunes Music Store.[34]

Amicus curiae Jun Group has had tremendous commercial success releasing music for free on peer-to-peer networks. Most recently, it released free copies of a major star's classic hit as a promotional tool for the release of his new album. Jun Group estimates that 2.5 million copies of the song were downloaded resulting in an eight times increase in sales of the album in some regions. Jun Group previously released five songs by Kevin Martin and the Hiwatts for free as part of a promotion for YooHoo Chocolate Drink. The music was downloaded more than two million times causing the largest spike ever in traffic to YooHoo's website.

Amicus curiae John Holowach recently released an entire album for free through a peer-to-peer network. The

(July 28, 2004) <http://www.detnews.com/2004/technology/0407/28/technology-224808.htm>.

[33] Chris Marlowe, "Artists take advantage of P2P music sharing." The Hollywood Reporter.com (August 25, 2004) <http://www.hollywoodreporter.com/thr/columns/tech_reporter_display.jsp?vnu_content_id=1000617772>.

[34] *Id.*

album received high praise. It also attracted the attention of another musician, Andrew Vavrek, who Holowach had never met. Vavrek remixed the song and added vocals. Holowach and Vavrek thus began a collaboration that has resulted in the formation, with others, of their band Tryad.

These are just anecdotes. But they stand in stark contrast to the industry's claims of impending doom. Perhaps the only thing that can be concluded is that it is far from clear, considering all music downloads, whether peer-to-peer file-sharing has decreased or increased sales of CDs.[35]

III. THE IMPOSITION OF SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENT WILL THWART THE DEVELOPMENT OF THESE BENEFICIAL AND NON-INFRINGING USES OF PEER-TO-PEER FILE-SHARING SYSTEMS

The imposition of secondary copyright liability on Grokster and StreamCast undoubtedly would exert a powerful chilling effect on all peer-to-peer systems. As a result, the substantial and beneficial non-infringing uses of the software will be thrown out with the bathwater of the infringing uses.

[35] Compare Felix Oberholzer and Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis* (March 2004) <http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf> (concluding that file-sharing does not reduce and may increase sales) with Stan Liebowitz, Will MP3 >Downloads Annihilate the Record Industry? The Evidence So Far (June 2003), <http://www.utdallas.edu/~liebowit/intprop/records.pdf> (attributing decline in CD sales to P2P file-sharing). *See also* LAWRENCE LESSIG, FREE CULTURE 68-73 (2004).

It takes time for an innovation to catch hold. And musicians and other artists, as well as business developers, are just beginning to discover the uses which can be made of peer-to-peer systems. Inevitably, the predominance and popularity of the legitimate uses of the technology will only continue to increase in the coming years.

The "P2P Stores" model, for example, allows for artists to "sell" recordings over peer-to-peer networks. Technologies such as Weed and MusicMatch overlay on top of file-sharing programs such as Grokster and StreamCast and allow for limited free downloading of recordings. Each system allows for three free "listens" before a fee must be paid. Each use peer-to-peer file-sharing to encourage network users to encourage their peers to sample and ultimately purchase the recordings.[36]

Unfortunately, the tremendous potential of peer-to-peer technology may never be realized if this Court were to impose an unduly restrictive requirement that the qualitatively substantial non-infringing uses be at all times in a technology's development the quantitatively predominant uses. This Catch-22 would do nothing to "promote the progress of . . . the useful arts."

Amici are aware that the petitioners and some of the other amici argue that holding Grokster and StreamCast liable for "active inducement" will not endanger legitimate peer-to-peer file-sharing. As Grokster and StreamCast point out, however, active inducement was not a theory pressed by the industry below. Instead, they sought to shut down these decentralized file-sharing technologies by

[36] "Content & Control," *supra* note 20, at AIII-4-5.

arguing simply that because these technologies could and would be used for infringing purposes, their makers and distributors were necessarily liable for copyright infringement. Because the distributors of every copying technology, from the Xerox machine to the VCR, know that it can and probably will be used for infringement, this argument was clearly wrong under *Sony*,[37] and ill-advised as a matter of copyright policy.

Nor is the Seventh Circuit's answer[38] – to balance the infringing against the non-infringing uses – acceptable. As Grokster and StreamCast explain, non-infringing uses, in the era of digital communications, means many thousands, if not millions, of lawfully exchanged files per day. These lawfully exchanged files are useful not only to musicians, but to artists of all types, and to writers and academics as well.

Nor will this Court requiring the use of filters to exclude copyrighted materials preserve the promise of peer-to-peer file-sharing. The lists of copyrighted works upon which filters will be based will undoubtedly come from the industry itself and not from artists who may choose to facilitate public access to their works. The lists will inevitably be overinclusive and underinclusive. Most importantly, however, filters will exclude all fair uses of the material and thus restrict copying of songs far beyond what copyright law provides.

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[37] *Sony*, 464 U.S. at 417.

[38] *In re Aimster Copyright Litigation*, 334 F.3d 643, 651-53 (7th Cir. 2003).

CONCLUSION

For the foregoing reasons, amici urge the affirmance of the court below.

Respectfully submitted,

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